Supreme Court of the United States

OCTOBER TERM, 1938.

No. 31.

THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, A CORPORATION, PETITIONER,

VS.

WILLIAM F. BOLIN, EDWARD E. BOLIN, SAMUEL A. BOLIN ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

RESPONDENTS' BRIEF.

MILES ELLIOTT,
of St. Joseph, Missouri,
RAY WEIGHTMAN,
of Maryville, Missouri,
E. H. GAMBLE,
of Kansas City, Missouri,
Attorneys for Respondents.

J. S. SHINABARGAR,
L. L. LIVENGOOD,
A. F. HARVEY,
of Maryville, Missouri,
Of Counsel.

2

INDEX

TABLE OF CASES

TEXTBOOKS

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 31.

THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, A CORPORATION, PETITIONER,

VS.

WILLIAM F. BOLIN, EDWARD E. BOLIN, SAMUEL A. BOLIN ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

RESPONDENTS' BRIEF.

I.

RESPONDENTS' STATEMENT.

As we do not think petitioner's statement is clear in some respects, we shall make a brief statement.

On June 3, 1896, petitioner issued to Pleasant Bolin, a resident of Nodaway County, Missouri, the policy or

certificate sued on, which provided for payment by petitioner of death benefits in the amount of one thousand dollars and a monument benefit of one hundred dollars (Rec. 22, 23).

This certificate was delivered to and accepted by the insured at Arkoe, in Nodaway County, Missouri (Rec. 21), after it had been signed by petitioner's consul commander and clerk of camp at Arkoe (Rec. 21) for the purpose of making it complete and binding, and it is not disputed that all the assessments were paid by Pleasant Bolin, the insured, to the clerk of petitioner's camp at Arkoe, Nodaway County, Missouri.

The certificate contained on its face a provision that payments should cease after twenty years (Rec. 22, 119). Pleasant Bolin made, and it was admitted by petitioner that he made, all the required payments for the period of twenty years and made no further payments thereafter (Rec. 119). Pleasant Bolin died July 18, 1933 (Rec. 8). Petitioner refused to pay the policy or certificate and this action was instituted thereon.

Respondents' petition, in somewhat conventional form, alleged the issuance of the certificate, compliance and performance by the insured, payment of all the required assessments for the prescribed period of twenty years, full performance by insured, the death of the insured and refusal of petitioner to pay the insurance (Rec. 4).

Petitioner's amended answer, on which the case was tried, admitted the essential facts alleged in the petition, but by way of defense pleaded that petitioner was and is a fraternal beneficiary association, incorporated under the laws of the State of Nebraska; that the payments to cease provision of the certificate was repealed by a bylaw enacted by the association in 1899; that the "payments to cease" provision of the certificate was *ultra vires* the

corporation; that, under the decision of the Supreme Court of the State of Nebraska in the case of *Trapp* v. *Sovereign Camp of the Woodmen of the World*, 102 Neb. 562, 168 N. W. 191, this provision had been held to be *ultra vires*, and, in substance, that under the full faith and credit clause of the Constitution of the United States the judgment of the Supreme Court of Nebraska in the Trapp case was binding on the courts of Missouri in the instant case (Rec. 7-16).

By their reply, respondents denied the matters of affirmative defense set up in petitioner's answer, pleaded facts showing that the contract was a Missouri contract and further pleaded: (1) That at the time of the issuance and delivery of the policy sued on petitioner did not have any license or authority to transact business in the State of Missouri and that the policy was, therefore, subject to and governed by the general insurance laws of the State of Missouri; (2) that insured, Pleasant Bolin, having fully and completely performed, complied with and completed the contract in every respect and having paid all the premiums, dues or assessments required for the prescribed period of twenty years, petitioner was estopped to say that any of its obligations under the policy, including the provision that payments should cease in twenty years, was *ultra vires* (Rec. 16-18).

The Circuit Court of Nodaway County, Missouri, in which the case was tried, found the issues for respondents and entered judgment accordingly. Petitioner perfected its appeal to the Supreme Court of Missouri on the ground that a question under the full faith and credit clause of the Federal Constitution was involved, which court, having no jurisdiction in the absence of a constitutional question, held that the decisive issue, upon which all others were dependent in the case, was the question of *lex loci contractus* and transferred the cause

to the Kansas City Court of Appeals, the court having the jurisdiction in the absence of a constitutional question (Rec. 114-117).

The Kansas City Court of Appeals affirmed the judgment of the circuit court on three principal grounds: (1) That petitioner not having been licensed to do business in Missouri as a fraternal beneficiary association at the time the certificate sued on was issued and not having shown that it had ever complied with the fraternal beneficiary laws of Missouri, the contract was subject to the general insurance laws of the State of Missouri; (2) that insured having fully performed the contract on his part and having made all the required payments for the prescribed period of twenty years and petitioner having accepted and retained the same, petitioner was estopped to plead that the payments to cease provision of the certificate was *ultra vires*; and (3) that petitioner could not, by an after-enacted bylaw, destroy or take away a substantial right of the insured under the contract of insurance (Rec. 118-136).

After having been denied a writ of certiorari to the Kansas City Court of Appeals by the Supreme Court of Missouri, petitioner applied to this court for a writ of certiorari, which was granted.

II.

SUMMARY OF ARGUMENT.

A.

The judgment of the state court rests (as we will show in following paragraphs) upon at least four independent grounds not involving a federal question and each of which is adequate to support the judgment. Therefore, this court is without jurisdiction and the writ of certiorari should be dismissed.

McCoy v. *Shaw*, 277 U. S. 302.

Lynch v. *People of New York ex rel. Pierson*, 293 U. S. 52.

Southwestern Bell Telephone Co. v. *State of Oklahoma et al.*, 58 S. Ct. 528.

Eastern Building & Loan Ass'n v. *Williamson*, 189 U. S. 122.

De Saussure v. *Gaillard*, 127 U. S. 216.

Wood Mowing & Reaping Machine Co. v. *Skinner*, 139 U. S. 293, 295, 297.

Mellon, Director General of Railroads, v. *O'Neil*, 275 U. S. 212.

Moore v. *Mississippi*, 21 Wall. 636, 639.

Murdock v. *City of Memphis*, 20 Wall. 590, 635, 636.

Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 86.

Klinger v. *Missouri*, (Mo., 1872) 80 U. S. (13 Wall.) 257, 20 L. Ed. 635.

Kennebeck R. Co. v. *Portland R. Co.*, (Me., 1872) 81 U. S. (14 Wall.) 23, 20 L. Ed. 850.

Leathe v. *Thomas*, (Ill., 1907) 207 U. S. 93, 28 S. Ct. 30, 52 L. Ed. 118.

Arkansas S. R. Co. v. *German Nat. Bank*, (Ark., 1907) 207 U. S. 270, 28 S. Ct. 78, 79, 52 L. Ed. 201.

Eustis v. *Bolles*, 150 U. S. 361, 37 L. Ed. 1111, 14 S. Ct. 131.

Bilby v. *Stewart*, (Okla.) 246 U. S. 255, 38 S. Ct. 264, 62 L. Ed. 701.

(a) The state court found for respondents upon, and based its decision upon, the ground (among others) that insured having fully performed the contract and having made the required payments for the prescribed period of twenty years and petitioner having accepted and retained the payments, petitioner was estopped to plead that the provision of the certificate, providing that payments thereon should cease in twenty years, *was ultra vires*. A decision of the state court based upon an estoppel does not present a federal question.

Adams County v. *Burlington, etc., R. Co.*, (Iowa, 1884) 112 U. S. 123, 5 S. Ct. 77, 28 L. Ed. 678.

Sherman v. *Grinnell*, (N. Y., 1892) 144 U. S. 198, 12 S. Ct. 574, 36 L. Ed. 403.

Israel v. *Arthur*, (Colo., 1894) 152 U. S. 355, 14 S. Ct. 583, 38 L. Ed. 474.

Michigan v. *Flint, etc., R. Co.*, (Mich., 1894) 152 U. S. 363, 14 S. Ct. 586, 38 L. Ed. 478.

Gillis v. *Stinchfield*, (Cal., 1895) 159 U. S. 658, 16 S. Ct. 131, 40 L. Ed. 295.

Beals v. *Cone*, (Colo., 1903) 188 U. S. 184, 23 S. Ct. 275, 47 L. Ed. 435.

Leonard v. *Vicksburg, etc., R. Co.*, (La.) 198 U. S. 416, 25 S. Ct. 750, 49 L. Ed. 1108.

Enterprise Irrigation Dist. v. *Farmers' Mut. Canal Co.*, (Neb.) 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644.

Eustis v. *Bolles*, (Mass., 1893) 150 U. S. 361, 14 S. Ct. 131, 37 L. Ed. 1111.

Pierce v. *Somerset R. Co.*, (Me., 1898) 171 U. S. 641, 19 S. Ct. 64, 43 L. Ed. 316.

Illinois Fuel Co. v. *Mobile & Ohio R. Co.*, 8 S. W. (2d) (Mo. Sup.) 834.

Mobile, etc., R. Co. v. *Mississippi*, 210 U. S. 187.
Cass County v. *Mercantile Ins. Co.*, 188 Mo. 1.
Lysaght v. *St. Louis Operative Stonemason's Assn.*, 55 Mo. App. 538.
City of Goodland v. *Bank of Darlington*, 74 Mo. App. 365.
St. Louis Drug Co. v. *Robinson*, 81 Mo. 18.
Prudential Ins. Co. v. *German Mutual Ins. Co.*, 105 S. W. (2d) 1001.
Rechow v. *Bankers' Life*, 73 S. W. (2d) l. c. 802.

(b) The decision of the state court was based upon the ground (among others) that the certificate sued on was subject to and governed by the general insurance laws of Missouri, for the reason that at the time it was issued, June 3, 1898, petitioner, a Nebraska corporation, was not licensed to do business in Missouri, and that from petitioner's amended answer and the state of the proof, it was to be presumed that petitioner has never complied with the fraternal beneficiary laws of Missouri so as to exempt it from the operation of the general insurance laws. This was purely a question of local law adequate to support the judgment, because the power of a state over foreign corporations doing business therein is equal to its power over domestic corporations.

Orient Ins. Co. v. *Daggs*, (Mo., 1899) 172 U. S. 557, 19 S. Ct. 281, 43 L. Ed. 552.
Equitable Life v. *Pettus*, (Mo., 1891) 140 U. S. 226, 11 S. Ct. 822, 35 L. Ed. 497.
N. Y. Life Ins. Co. v. *Cravens*, (Mo., 1900) 178 U. S. 389, 20 S. Ct. 962, 44 L. Ed. 1116; affirming the case in 148 Mo. 583.
Northwestern Nat. Life v. *Riggs*, (Mo., 1906) 203 U. S. 243, 27 S. Ct. 126, 51 L. Ed. 168.
Kern v. *Legion of Honor*, 167 Mo. 471.

Harris v. *Switchmen's Union of North America*, 237 S. W. 155.

Gruwell v. *Knights & Ladies of Security*, 126 Mo. App. 496.

Brassfield v. *Knights of Maccabees*, 92 Mo. App. 102.

Thompson v. *Royal Neighbors of America*, 154 Mo. App. 109.

Schmidt v. *Foresters*, 228 Mo. 675.

Mathews v. *Modern Woodmen*, 236 Mo. 326.

(c) The certificate was delivered to and accepted by Pleasant Bolin, the insured, in the State of Missouri. He paid all of the dues and assessments thereon in Missouri. This makes it a Missouri contract to which the laws of Missouri apply and by the laws of which it is governed; and the issues concerning it are to be adjudicated in accordance with the laws of Missouri.

New York Life Ins. Co. v. *Cravens*, 178 U. S. 389.

Mutual Life Ins. Co. of New York v. *Johnson*, 293 U. S. 335.

Northwestern Mutual Life Ins. Co. v. *McCue*, 223 U. S. 234.

Equitable Life Assurance Society v. *Pettus*, 140 U. S. 226.

Ragsdale v. *Brotherhood of Railroad Trainmen*, 80 S. W. (2d) 272.

Johnson v. *American Century Life Ins. Co.*, 249 S. W. 115.

Grant v. *North American Benefit Corp.*, 8 S. W. (2d) 1043.

Weed v. *Bank Savings Life Ins. Co.*, 24 S. W. (2d) 653.

Crohn v. *U. C. T.*, 170 Mo. App. 273.

(d) The certificate sued on being a Missouri contract, the contract rights therein provided could not be

materially changed or modified by so-called by-laws subsequently enacted by the company, or changed or modified by the laws of Missouri or any other state.

Dessauer v. *Supreme Tent, Knights of Maccabees,* 278 Mo. 57, 210 S. W. 896.

Crnic v. *Croatian Fraternal Union of America,* 89 S. W. (2d) 683, l. c. 691.

Dawson v. *Knights of Maccabees of the World,* 57 S. W. (2d) 748.

Ayers v. *Grand Lodge A. O. U. W.,* (N. Y., '07) 188 N. Y. 280, 80 N. E. 1020.

White v. *Park,* (1872) 13 Wall. 646.

Barnitz v. *Beverly,* (Kan., '96) 163 U. S. 118.

W. B. Worthen Co. v. *Thomas,* (Ark., 34, Hughes, J.) 292 U. S. 426.

W. B. Worthen Co. v. *Kavanaugh,* (Ark., '35, Cardozo, J.) 295 U. S. 56.

Treigle v. *Acme Homestead Ass'n,* (La., '36, Roberts, J.) 297 U. S. 189.

International Steel, etc., Co. v. *National Surety Co.,* (Tenn., '36, Roberts, J.) 297 U. S. 657.

State of Indiana ex rel. Anderson v. *Brand,* (Ind., '38, Roberts, J.) 58 S. Ct. 443.

Bedford v. *Eastern Building & Loan Ass'n,* 181 U. S. 227.

Coombes v. *Getz,* 285 U. S. 434.

B.

The Trapp case (Rec. 71-94), relied on by petitioner, was not binding on the courts of Missouri in the instant case.

34 C. J., Sec. 1422, p. 1004.

12 C. J., Sec. 1006, p. 1228.

Story's Equity Pleadings (14th Ed.), Sec. 208, p. 196.

Street's Federal Equity Practice, Vol. 1, Secs. 542, 544, 547, 548.

Henderson v. *Kentzer,* 76 N. W. (Neb.) 881.

Paxton Cattle Co. v. *First Nat'l Bank of Arapahoe*, 33 N. W. (Neb.) 270.

Cole v. *Cunningham et al.*, 133 U. S. 107.

United Shoe Machinery Corporation v. *United States*, 258 U. S. 451.

Larsen v. *Northland Transportation Co.*, 292 U. S. 20.

Southern Pacific R. Co. v. *United States*, 168 U. S. 1.

City of New Orleans v. *Citizens Bank of Louisiana*, 167 U. S. 371.

American Surety Co. v. *Baldwin*, 287 U. S. 156.

Old Wayne Mutual Life Ass'n v. *McDonough et al.*, 204 U. S. 8, 27 S. Ct. 236.

C.

If the decision in the Trapp case were applicable (which it is not), it is in violation of Section 10, Article I, the contract clause, of the Constitution of the United States in that it holds a substantial provision of an insurance contract, to-wit, a provision that payments thereon should cease in twenty years, to have been invalidated by a subsequently enacted statute of the State of Nebraska.

Bank of Minden et al. v. *Clement*, 256 U. S. 126, 41 S. Ct. 408.

Treigle v. *Acme, etc., Ass'n*, 297 U. S. 189, 56 S. Ct. 408.

D.

The authorities relied on by petitioner are not applicable. The authorities cited by petitioner involve only questions of internal affairs or business management of the society or corporation, and questions arising in corporate receiverships or similar proceedings. None of them involves the construction or effect of a contract between the corporation itself and another party. None of them involves the rule of estoppel under the law of the forum.

III.

ARGUMENT.

A.

The judgment of the state court rests (as we will show in following paragraphs) upon at least four independent grounds not involving a federal question and each of which is adequate to support the judgment. Therefore, this court is without jurisdiction, and the writ of certiorari should be dismissed.

In *Arkansas S. R. Co.* v. *German National Bank*, 207 U. S. 270, the opinion tersely states the rule that where the judgment of the state court rests upon an independent nonfederal question, adequate to support the judgment, the writ of error or of certiorari must be dismissed:

> "But, according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a federal question was necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no federal question, the same result must follow, as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong."

There is no exception to this rule. While there are decisions, such as *McCoy* v. *Shaw*, 277 U. S. 302, holding that this rule will not be enforced where the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent re-

view on a decision of a federal question, those cases do not present real exceptions.

(a) The state court found for respondents upon, and based its decision upon, the ground (among others) that, insured having fully performed the contract and having made the required payments for the prescribed period of twenty years and petitioner having accepted and retained the payments, petitioner was estopped to plead that the provision of the certificate, providing that payments thereon should cease in twenty years, was ultra vires. A decision of the state court based upon estoppel does not present a federal question.

The certificate sued on contained a provision on its face that payments should cease in twenty years. Bolin, the insured, made all the required payments for that period. Petitioner pleaded that this provision of the certificate was *ultra vires*, but the state court held that, the insured having fully performed the contract on his part and having made all of the required payments, and petitioner having accepted and retained those payments, petitioner was estopped to plead that this provision of the certificate was *ultra vires*. This ruling merely declared the well-established law of Missouri.

Illinois Fuel Co. v. *Mobile & Ohio R. Co.*, 8 S. W. (2d) (Mo. Sup.) 834.

Cass County v. *Mercantile Ins. Co.*, 188 Mo. 1.

Lysaght v. *St. Louis Operative Stonemason's Ass'n*, 55 Mo. App. 538.

City of Goodland v. *Bank of Darlington*, 74 Mo. App. 365.

St. Louis Drug Co. v. *Robinson*, 81 Mo. 18.

Prudential Ins. Co. v. *German Mutual Ins. Co.*, 105 S. W. (2d) 1001.

Rechow v. *Bankers Life*, 73 S. W. (2d) l. c. 802.

This court has consistently held that a decision of a state court based upon an estoppel does not present

a federal question. The legal questions here involved are not unlike those in *Enterprise Irrigation Dist. et al. v. Farmers Mutual Canal Co. et al.*, 243 U. S. 157, where Mr. Justice Van Devanter speaking for the court said:

> "In view of the facts before recited we think it cannot be said that the ruling upon the question of estoppel is without fair support, or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of the other ground of the judgment. We, therefore, are not at liberty to inquire whether the ruling is right or wrong. And it may be well to add that the question did not originate with the court. It was presented by the pleadings, was in the minds of the parties when the stipulation was made, and was dealt with by counsel and court as a matter of obvious importance.
>
> "It is not urged, nor could it well be, that, as a ground of decision, the estoppel is not broad enough to sustain the judgment."

(b) The decision of the state court was based upon the additional ground that the policy was subject to the general insurance laws of Missouri, because at the time it was issued, petitioner, a Nebraska corporation, was not licensed to do business in Missouri, and that under petitioner's amended answer and the state of the proof, it was to be presumed that petitioner never complied with the fraternal beneficiary laws of Missouri.

In 1896, at the time the certificate sued on was issued, there was no provision under the laws of Missouri for the licensing of a foreign fraternal beneficiary association to do business as such in the state. The fact that petitioner was at that time doing business in Missouri without a license was undisputed. Also, the state court found that, from petitioner's amended answer and from the state of the proof as shown by the record, it was to be presumed that petitioner had never complied with the fraternal beneficiary laws of

Missouri so as to exempt it from the operation of the general insurance laws, and that, therefore, petitioner was not in position to contend that it was subject to fraternal beneficiary laws. The Kansas City Court of Appeals, in so holding, followed a long line of Missouri decisions, a few of which are:

Kern v. *Legion of Honor*, 167 Mo. 471.

Harris v. *Switchmen's Union of North America*, 237 S. W. 155.

Gruwell v. *Knights & Ladies of Security*, 126 Mo. App. 496.

Brassfield v. *Knights of Maccabees*, 92 Mo. App. 102.

Thompson v. *Royal Neighbors of America*, 154 Mo. App. 109.

Schmidt v. *Foresters*, 228 Mo. 675.

Mathews v. *Modern Woodmen*, 236 Mo. 326.

There can be no question that the power of a state over foreign corporations doing business therein is equal to its power over domestic corporations. The courts of Missouri have consistently held that no insurance society, whether foreign or domestic, can do business as a fraternal beneficiary association in the state until it shall have obtained a license so to do, and shall have complied with the fraternal beneficiary laws of Missouri. When petitioner undertook to do business in Missouri, it subjected itself to the laws of Missouri, and when it did business in Missouri without having obtained a license as a fraternal beneficiary association ficiary statutes, it subjected itself to the general in- and without having complied with the fraternal benesurance laws.

That the power of a state over foreign corporations doing business within its borders is equal to its power

over domestic corporations is so well settled as to require no argument.

Orient Ins. Co. v. *Daggs,* (Mo., 1899) 172 U. S. 557, 19 S. Ct. 281, 43 L. Ed. 552.

Equitable Life v. *Pettus,* (Mo., 1891) 140 U. S. 226, 11 S. Ct. 822, 35 L. Ed. 497.

New York Life Ins. Co. v. *Cravens,* (Mo., 1900) 178 U. S. 389, 20 S. Ct. 962, 44 L. Ed. 1116; affirming the case in 148 Mo. 583.

Northwestern Nat. Life v. *Riggs,* (Mo., 1906) 203 U. S. 243, 27 S. Ct. 126, 51 L. Ed. 168.

This was purely a question of local law, substantial and adequate to support the judgment and, like the question of estoppel, was covered by the pleadings (see Plaintiffs' Reply, Transcript of Record, page 16 *et seq.*) and was fully considered and definitely decided by the state court (Rec. 147-152).

(c) The decision of the state court was also based on the ground that the contract sued on was a Missouri contract and subject to the laws of Missouri. The certificate was delivered to and accepted by Pleasant Bolin, the insured, in the State of Missouri. He paid all of the dues and assessments thereon in Missouri. This makes it a Missouri contract to which the laws of Missouri apply and by the laws of which it is governed; and the issues concerning it are to be adjudicated in accordance with the decisions of the courts of Missouri.

The record in this case discloses that Pleasant Bolin lived in Missouri, that he made his application for insurance in Missouri, that the policy was delivered to him at Arkoe, Missouri, that all of the premiums were paid by the said Bolin in Missouri, and under this state of facts, clearly his contract of insurance is a Missouri contract. This has been the universal rule announced by this court and is followed by the Missouri decisions.

(d) This policy or certificate of insurance being a Missouri contract, the contract rights therein provided could not be materially changed or modified by so-called bylaws subsequently enacted by the company, or changed or modified by the laws of Missouri or any other state.

The contract of insurance in question was issued to Bolin on June 3, 1896. At that time there was no statutory provision in the State of Nebraska or no charter provision of petitioner (as shown by the pleading and proof) which prohibited the issuance of such a contract of insurance. Thereafter in 1899, the petitioner passed a bylaw which prohibited the further issuance of such contracts of insurance.

At the time the subsequently enacted bylaw was passed by the petitioner, the rights of Pleasant Bolin had become firmly vested under his contract. Therefore the petitioner had no right, by the enactment of said bylaw, to in any wise impair the contract rights of Bolin which had already accrued. We have heretofore shown that this contract of insurance is clearly an old line policy of insurance. It has well been said by the Missouri state court, in *Crnic v. Croatian Fraternal Union of America*, 89 S. W. (2d) local page 691:

> "To permit defendant, after such right had become vested, by amendatory bylaws or otherwise, to change the benefits in any manner to which plaintiff had become entitled would be to permit it to change and nullify the contract entered into with plaintiff and take away from plaintiff a substantial right conferred by the contract of membership itself. This it cannot be permitted to do."

Not only is the foregoing rule followed by the Missouri courts, but there are many decisions of this court to the same effect. We call attention to the case of *Bedford* v. *Eastern Building & Loan Ass'n*, 181 U. S. 227.

In that case a certificate of stock had been issued to a member. At the time the certificate of stock was issued, the member had a right to apply and obtain a loan on such certificate of stock. Thereafter the state legislature passed an act prohibiting such loans. This court, in passing upon the subsequently enacted statute, held that the same impaired the obligation of an existing contract, that the member's rights to such contract having become vested, the same could not be taken away from him or in any way impaired by the passage of such statute.

B.

The Trapp case (Rec. 71-94), **relied on by petitioner, was not binding on the courts of Missouri in the instant case.**

(a)

In its answer (Rec. 7-16), petitioner did not plead that the courts of Missouri were conclusively bound by the judgment of the Supreme Court of Nebraska in the Trapp case, but simply pleaded, in effect, that in that case the Supreme Court of Nebraska had held the "payments to cease" clause of the certificate to be *ultra vires* the corporation. It is true that petitioner did plead that full faith and credit should be given to that decision. But as to whether it should be given credit only as a precedent and not as *res adjudicata* petitioner did not plead. Under the Missouri rules of pleading, the defense of *res adjudicata* must be pleaded in order to be available.

(b)

In any event, the judgment of the Supreme Court of Nebraska in the Trapp case could not have been bind-

ing on the courts of Missouri in the instant case, unless the Trapp suit measured up to all the requirements of a class case in which Bolin was a member of the class and in which his rights were in all respects common to those of Trapp.

34 C. J., Sec. 1422, p. 1002.

It is said in Story's Equity Pleadings (14th Ed.), Sec. 208, p. 196:

> "Upon the general principles of courts of equity, there would be an impropriety in binding either the legal claimants or equitable claimants unless they were fully represented and permitted to assert their rights before the court."

In Street's Federal Equity Practice (1st Ed.), Vol. I, Sec. 542, the rule is announced that joinder will not be permitted where there are separate interests.

The same author says, in Section 544, it is required that the person who sues as a representative of a class must have an actual interest in the controversy in like right with those he proposes to represent, and that the relation of the parties must be such that the representative and represented could properly be joined as co-plaintiffs, if practicable to do so.

In Section 547 of the same work, it is stated that in a true class suit the subject matter of the suit is a fund or property over which the court can and does acquire an effective jurisdiction by the joining of some persons as plaintiffs or defendants who may be considered representatives of all who are interested in the fund or property.

In Section 548, the author defines spurious class suits and describes them as suits not concerned with a fund or property at all but with personal liability, and points out that, in spurious class suits, suit is brought by or

against numerous parties in respect of personal liability. The author further says, in that section, that, if relief is sought against an unincorporated association or individuals or against numerous defendants who are acting together, it is spurious, and that the decree entered in a suit against only a few cannot be effective against others who are not actually made parties, unless and until they are formally brought in and bound by the decree.

There are at least six reasons why the Trapp suit was not binding as a class case on the rights of Bolin and his beneficiaries, the respondents herein.

1. At the time the Trapp suit was filed, March 29, 1916, no right of action existed on the Bolin policy, because at that time payments had not been made on the Bolin policy for the prescribed period of twenty years. In the Bolin case that period did not expire until June 1, 1916.

2. While the petition in the Trapp case stated that Trapp brought the suit for himself and others similarly situated, the prayer of that petition did not ask for relief for anyone except Trapp and did not ask for relief for anyone else or for any class or members of a class; and the judgment rendered in the Trapp case did not purport to apply to any other person of the same class as Trapp or to any other class.

3. As we have before shown, the Bolin policy was governed by the old line insurance laws of Missouri, because petitioner had not obtained a license to do business in Missouri at the time the policy was issued. In his suit in Nebraska, Trapp did not plead or assert his rights under the laws of Missouri; and when he failed to do so he segregated himself from the class, to which Bolin belonged, holding Missouri policies or certificates.

4. In the insant case, there was a good and sufficient plea of estoppel or to set up the defense of *ultra vires*, which defense was upheld by the Missouri courts, while in the Trapp case there was no plea sufficient, under the Nebraska law, to raise the issue of estoppel. The Nebraska courts hold that in order to plead estoppel in the State of Nebraska, it is necessary to plead the facts constituting the estoppel. To merely allege that the other party is estopped by his acts, as did Trapp, without pleading what those acts were, is but a statement of a legal conclusion and ineffectual, under the laws of Nebraska, for an adjudication of the question of estoppel.

Henderson v. *Kentzer*, 76 N. W. (Neb.) 881.
Paxton Cattle Co. v. *First Nat'l Bank of Arapahoe*, 33 N. W. (Neb.) 270.

5. The Trapp case cannot be deemed a class suit as to Bolin, because the Trapp suit is based merely on a resolution of petitioner's executive council, providing for paid-up certificates, and the fraternal insurance laws of Nebraska, whereas the Bolin suit is based on a certificate or policy of insurance issued in Missouri, governed by the laws of Missouri and protected by the contract clause of the Federal Constitution.

In his petition Trapp prayed for a decree commanding and enjoining the petitioner to forthwith issue to him a paid-up certificate of membership. In order for Trapp to maintain his suit, it was necessary for him to base his petition upon, and he did base his petition upon, a mere resolution of petitioner's executive council adopted January 18, 1893, providing for paid-up certificates and the fraternal insurance laws of Nebraska. The instant case is based upon the certificate itself and upon the right which accrued to Bolin's beneficiaries after his death.

There was no showing that Bolin acquiesced in the

Trapp case, knew anything about it or had anything to do with it, and there is no showing that the rights upon which he relied were in any way represented or adjudicated in the Trapp case.

6. There was no showing in the record of the Trapp case that the rights or interests of any holder of a policy or certificate, under the Missouri laws, were fairly represented or protected; that any such certificate holder had any knowledge of the suit or any opportunity to have his interests fairly protected, or represented, or knew anything about the Trapp suit or in any manner acquiesced therein. Therefore, the Trapp case did not meet the requirements of a class suit.

Old Wayne Mutual Life Ass'n v. *McDonough et al.*, 204 U. S. 8, 27 S. Ct. 236.

(c)

The local questions under the Missouri law, to-wit, that policies issued by petitioner in the State of Missouri, when it did not have a license to do business as a fraternal beneficiary association in the state, and the question of estoppel of a corporation to plead *ultra vires* where the contract has been fully performed by the other party, not having been raised or adjudicated in the Trapp case, the judgment in that case was not binding on Bolin or on his beneficiaries in the instant case.

Cole v. *Cunningham et al.*, 133 U. S. 107.

United Shoe Machinery Corporation v. *United States*, 258 U. S. 451.

Larsen v. *Northland Transp. Co.*, 292 U. S. 20.

Southern Pacific R. Co. v. *United States*, 168 U. S. 1.

City of New Orleans v. *Citizens Bank of Louisiana*, 167 U. S. 371.

(d)

It not having been shown that Bolin was in any manner a party to, or notified of, the Trapp suit and Bolin not having been represented by Trapp as a member of a class and not having in any manner acquiesced in the judgment in the Trapp suit, to hold that the judgment in that case deprived Bolin of his right to a paid-up insurance policy, after he had made all the required payments for the specified period, would have been to deprive him of his property without due process of law, in violation of the due process clause in the Fourteenth Amendment to the Constitution of the United States.

American Surety Co. v. *Baldwin*, 287 U. S. 156.

C.

If the decision in the Trapp case were applicable (which it is not), it is in violation of Section 10, Article I, the contract clause, of the Constitution of the United States in that it holds a substantial provision of an insurance contract, to-wit, a provision that payments thereon should cease in twenty years, to have been invalidated by a subsequently enacted statute of the State of Nebraska.

The decision of the Nebraska court in the Trapp case is founded solely upon the opinion of the Supreme Court of Nebraska in *Haner* v. *Grand Lodge, A. O. U. W.*, 168 N. W. 189. As we will show, the decision in the Trapp case is in effect a ruling that the payments to cease provision of the Trapp insurance certificate which was issued March 11, 1895, was invalidated by a statute of Nebraska enacted in 1897. Therefore, the decision in the Trapp case is itself violative of the contract clause of the Federal Constitution, Article I, Section 10, and cannot bind the courts of Missouri or any other state.

Haner v. Grand Lodge, A. O. U. W., supra, was an action on a policy which the opinion says was issued in 1888. In May, 1907, nineteen years after the Haner policy was issued, the association adopted a new bylaw which provided that a member on attaining the age of seventy, irrespective of disability, should be entitled to an endowment. Haner sued for that endowment, basing his action upon the 1907 bylaw of the association. It appeared that he was not disabled, though he had attained the age of seventy. The Supreme Court of Nebraska held that this bylaw was *ultra vires* of the corporation under a statute of Nebraska passed in 1897, ten years before the bylaw was enacted upon which Haner's suit was based.

The Haner opinion cites this statute as it appears in Neb. Rev. St., 1913, Sec. 3295. But the fact is that it first appears in the Nebraska Session Laws, 1897, Ch. 47, p. 266. Prior to 1897, the Nebraska law permitted a Nebraska fraternal association to issue any kind of policy that an old line insurer could issue, with no restriction of any kind in that respect by reason of its being a fraternal association.

In holding that the Trapp case was governed by the decision in the Haner case and that under the Haner case the payments to cease provision of the Trapp certificate was *ultra vires*, the Supreme Court of Nebraska necessarily held that under the statute of Nebraska passed in 1897, two years after the Trapp policy was issued, the payments to cease provision thereof was invalidated.

In so holding, the decision in the Trapp case plainly violates the contract clause of the Federal Constitution. That a provision of an insurance contract for a paid-up certificate is a substantial right or obligation does not permit of argument. While the ruling of the Supreme

Court of Nebraska in the Trapp case did not destroy the entire contract, it impaired the obligation of the contract by destroying a substantial provision thereof.

In *Bank of Minden et al.* v. *Clement*, 256 U. S. 126, this court, quoting with approval the language of *Planters' Bank* v. *Sharp*, 6 How. 327, 12 L. Ed. 447, said:

> "'One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force.'"

To the same effect see

Treigle v. *Acme, etc., Ass'n*, 297 U. S. 189, 56 S. Ct. 408.

D.

The authorities relied on by petitioner are not applicable. The authorities cited by petitioner involve only questions of internal affairs or business management of the society or corporation, and questions arising in corporate receiverships or similar proceedings. None of them involves the construction or effect of a contract between the corporation itself and another party. None of them involves the issue of estoppel under the law of the forum.

Most of the argument of petitioner has been answered by what we have said in the preceding parts of this brief. However, we will briefly notice some of the arguments made by petitioner.

(a) We recognize that the decisions of the courts of the domicile of a corporation or an association as to matters resting solely upon the mere fact of membership in the association or corporation, such as fixing the rate

of assessments by insurance societies, such as the obligations and liabilities of a member or stockholder in an association or corporation purely and solely by reason of the fact of membership, are binding upon the courts of other states, as is held in *Supreme Council of Royal Arcanum* v. *Green*, 237 U. S. 531, and like cases.

There can hardly be a question that the liabilities or obligations of a stockholder as such in a corporation, as created by the laws of its home state, are controlled by those laws and that the decisions of that state construing those laws are binding upon the courts of other states, as is held in *Converse* v. *Hamilton*, 224 U. S. 243, and similar cases cited by petitioner.

But none of those cases has any applicability here, because in the instant case the court must consider the rights created by a separate and independent contract between an association or corporation and another party. Certainly, the fact that the other party happens to be a member of the association or a stockholder in the corporation does not exempt the contract from the operation of the laws of the state where this independent and separate contract is made, executed and performed.

In the decisions cited by petitioner involving fraternal and assessment insurance associations, the courts have said that membership may be likened to marriage or to the family relation. This comparison is not inapt so far as it applies only to the mere relation of membership. To carry the comparison further and to compare the relationship between the holder of an insurance contract and the association is to show that the comparison is not apt.

The members of a family may be subject to the rules and regulations made by the head of the family for the control of the family affairs, but, when the family enters into a business contract with a member of the family, the law of contracts controls just the same as if the

contract had been made with a stranger. If the members, through the head of the family or other representatives, go to another state and in that other state enter into a business contract with a member of the family, resident in such other state, which is executed, delivered and to be performed in that other state, the contract is governed by the laws of that state and not by the laws of the state of the family's domicile.

While *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, may at first glance appear to be an exception to the rule announced in *Royal Arcanum* v. *Green*, *supra*, and like cases, careful consideration of the Mixer case reveals that it makes no such exception. No provision of a contract was under consideration in the Mixer case. This court, in that case, merely held that the decision of the Supreme Court of Illinois, in which state the association was incorporated, construing a bylaw of the corporation, which bylaw pertained to the remedy rather than the substance of the contract, was binding upon the courts of other states.

If the Mixer case had undertaken to hold that an insurance association could by an after-enacted bylaw impair a substantial right under a contract of insurance, it would have announced an unsound rule of law which could not be followed. For neither party to a contract can, by his act without the consent of the other party, impair the obligation of the contract.

Further, in *Steen* v. *Modern Woodmen*, 296 Ill. 104, 129 N. E. 546, the Illinois decision under consideration in the Mixer case, nobody but the plaintiff Steen, and the defendant insurance society was a party to the cause. The judgment in that case was subject to review in a similar action in the courts of Illinois between another plaintiff and the same defendant. It amounted only to a

precedent and not a conclusive judgment as to other parties in the courts of Illinois. So, the only effect of the Mixer case, in its last analysis, is a holding that as to the rights and obligations arising from the naked fact of membership in a corporation, the law of the state of its domicile controls.

Moreover, the Mixer case involved no issue of estoppel, and does not conflict with other decisions of this court holding that such issue is governed by the law of the forum as a part of the public policy of the state, and that no provision of the constitution has any bearing thereon, and that if the state court decision is based on the state's rules of estoppel, it will not be reviewed by this court on certiorari.

(b) It was wholly immaterial in the instant case whether the "payments to cease" provision of the contract sued on was or was not *ultra vires* the petitioner under the laws of Nebraska, because under the law of Missouri petitioner was estopped to plead as a defense in a Missouri court that this provision of the contract was *ultra vires*. This part of petitioner's argument is fully answered by Section A, Paragraph (a), of our argument.

(c) Petitioner's argument that the Trapp case was a class suit and binding upon respondents in the instant case is answered by Section B of our argument.

(d) This part of petitioner's argument is answered by what we have said in the preceding paragraphs of this section of our argument.

(e) Petitioner's argument is answered by Section A of our argument.

(f) Petitioner's argument is answered by Paragraph (a) of this section of our argument.

We note, however, that petitioner contends that where a constitutional question is present the plea of estoppel must be absent. It has been consistently held by this court that one may waive the right to assert, or by his conduct be estopped to assert, a constitutional right just the same as he can waive or be estopped to assert any other right.

Leonard v. *Vicksburg, etc., R. Co.,* (La.) 198 U. S. 416, 25 S. Ct. 750, 49 L. Ed. 1108.

Pierce v. *Somerset R. Co.,* (Me., '98) 171 U. S. 641, 19 S. Ct. 64, 43 L. Ed. 316.

Wall v. *Parrot Silver, etc., Co.,* (Mont., '17) 244 U. S. 407, 37 S. Ct. 681, 61 L. Ed. 1229.

Pierce Oil Co. v. *Phoenix Ref. Co.,* (Okla., '22) 259 U. S. 125, 42 S. Ct. 440, 66 L. Ed. 855.

St. Louis Malleable Casting Co. v. *George C. Prendergast Construction Co.,* (Mo.) 43 S. Ct. 178, 260 U. S. 469, 67 L. Ed. 351.

(g) Petitioner's argument is answered by what we have said in the preceding parts of this brief.

Respectfully submitted,

MILES ELLIOTT,
of St. Joseph, Missouri,
RAY WEIGHTMAN,
of Maryville, Missouri,
E. H. GAMBLE,
of Kansas City, Missouri,
Attorneys for Respondents.

J. S. SHINABARGAR,
L. L. LIVENGOOD,
A. F. HARVEY,
of Maryville, Missouri,
Of Counsel.